2001

State of Utah v. Dean Allen Mogen : Brief of Appellant

Utah Court of Appeals

Wes Baden; Uintah County Public Defender; Attorney for Appellee.
Joanne C. Slotnik; Assistant Attorney General; Mark L. Shurtleff; Attorney General; G. Mark Thomas; Deputy Uintah County Attorney; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	Case No. 20010207-CA
DEAN ALLEN MOGEN,	:	Priority No. 15
Defendant/Appellee.	:	

BRIEF OF APPELLANT

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APPEAL FROM AN ORDER DISMISSING ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE), A THIRD DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (2000), AND ONE COUNT OF POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. § 58-37a-(5)(1)(2000), IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR UINTAH COUNTY, THE HONORABLE JOHN R. ANDERSON, PRESIDING

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order dismissing one count of possession of a controlled substance (methamphetamine), a third degree felony, and one count of possession of drug paraphernalia, a class B misdemeanor. This Court has jurisdiction over the case pursuant to Utah Code Ann. § 78-2a-3(2)(e)(1996).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

Was defendant still seized within the meaning of the Fourth Amendment after the deputy sheriff, who had stopped defendant's vehicle for speeding, issued a verbal warning citation, returned defendant's documents, told him he was free to go, and stepped back from the vehicle?

A bifurcated standard of review governs here. The trial court's findings of fact are reviewed deferentially and should be

reversed only if they are clearly erroneous. The court's conclusions of law growing out of the factual findings, however, are reviewed for correctness, giving some measure of discretion to the trial court in applying the legal standards to the facts. See State v. Pena, 869 P.2d 932, 935-40 (Utah 1994); State v. Moreno, 910 P.2d 1245, 1247 (Utah App.), cert. denied, 916 P.2d 909 (Utah 1996).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. Const. amend. IV.

STATEMENT OF THE CASE

Defendant was charged by information with one count each of possession of a controlled substance and possession of drug paraphernalia (R. 4). Following a preliminary hearing, the case was bound over to district court, where defendant filed a motion to suppress (R. 26, 36-40). After a hearing on the motion, the court suppressed the evidence, and the case was dismissed (R. 60-62, 71; R. 56-59 or addendum A). The State filed a timely notice of appeal (R. 64-65).

STATEMENT OF THE FACTS

On August 22, 2000, Deputy Sheriff Troy Slaw of the Uintah County Sheriff's Office stopped a large Dodge flatbed truck for speeding on SR40 near rural Jensen, Utah (R. 71: 2, 6). Leaving his overhead lights flashing to alert other motorists of the stopped vehicles by the side of the road, Slaw approached the truck, which was driven by defendant, and asked for and obtained defendant's driver's license (Id. at 3, 9). The officer then returned to his own vehicle to run a routine license check (Id. at 3). After a few minutes, the check came back clear, and Slaw returned to defendant's vehicle (Id.).

Slaw returned defendant's documents and issued a verbal warning for speeding (Id. at 3, 8, 13, 16). He also stated that he explicitly advised defendant that he was free to leave (Id. at 3, 4, 13, 16). Defendant did not respond to the officer's statements to him (Id. at 3). The officer also testified that he did not physically obstruct defendant's departure in any way (Id. at 10).

Slaw turned to go, taking a "couple of steps" towards his patrol vehicle (Id. at 4). He then turned back towards defendant, and again made contact with him by asking if he had any illegal drugs or weapons in the truck and if defendant would mind if he "took a look" (Id. at 4, 8). Defendant responded that it would be fine (Id. at 4). When the officer searched the

truck, he discovered the items of contraband forming the basis of the criminal charges against defendant (Id. at 4; R. 72: 6-8, 8-9).

For his part, defendant testified that he did not remember the officer telling him he was free to go and that if the officer did tell him, he did not hear it (Id. at 13, 16). Defendant further testified that when the officer returned his driver's license, he stared at defendant for a few seconds, causing defendant to feel that the officer "had something more to say" (Id. at 14). When asked why he did not leave, defendant responded that the officer's flasher lights were still on and also that he was unsure he could safely pull away, given that his truck had flared-out sides and the officer was standing nearby (Id. at 14-15). Defendant did not dispute that he consented to the search of his vehicle (Id. at 15).

SUMMARY OF ARGUMENT

The trial court erred in determining that the Fourth Amendment seizure was continuous and that all evidence seized pursuant to defendant's consent to search must, therefore, be suppressed. The constitutionally-protected seizure ended when the officer issued a verbal warning, returned defendant's documents, told defendant he was free to go, and turned away from defendant, taking a couple of steps towards his patrol vehicle. At that juncture, the seizure de-escalated to a voluntary level

one encounter. The status of the subsequent discussion between the officer and defendant was, therefore, a level one voluntary encounter, to which the protections of the Fourth Amendment do not apply. Because defendant gave his consent to search during a voluntary encounter, the evidence discovered as a result should not have been suppressed.

ARGUMENT

THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT WAS STILL SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT AFTER THE OFFICER, WHO HAD STOPPED DEFENDANT FOR SPEEDING, ISSUED A VERBAL WARNING, RETURNED HIS DOCUMENTS, TOLD HIM HE WAS FREE TO GO, AND STEPPED BACK FROM THE VEHICLE

In granting defendant's suppression motion, the trial court determined that defendant was not free to go after the officer gave him a warning citation, returned his documents, and turned and took a couple of steps back toward his patrol vehicle (R. 58 or addendum A). Concluding that defendant was, therefore, continually seized from the moment the officer stopped him, the court suppressed all evidence discovered during the subsequent consensual search of the truck (R. 43).

Specifically, the trial court articulated the following relevant findings of fact as the basis for its ruling:

> 4. Deputy Slaugh [sic]. . . returned to the defendant his license and any other paper the defendant had given him. Deputy Slaugh gave the defendant a warning for the speeding

> violation and then turned and took a couple steps back toward his vehicle.
>
> 5. At this time, Deputy Slaugh's overhead lights were still flashing.
>
> 6. Within a few seconds Deputy Slaugh stepped back to the driver's window and asked the defendant if he had, "any guns, drugs, knives or bombs" in his vehicle. Defendant replied negatively. Deputy Slaugh then asked the defendant for permission to look.

R. 58 at addendum A. Based on these facts, the court concluded that the Fourth Amendment seizure was continuous and that it did not de-escalate into a level one voluntary encounter when the officer returned defendant's documents and turned and took a few steps back toward his patrol car:

> 2. Based on the facts of this case, the defendant did not reasonably feel comfortable in leaving, and the court finds that the natural inference is that the defendant was still being detained when the deputy asked his permission to search the defendant's vehicle.
>
> 3. The defendant voluntarily consented to a search of the vehicle he was driving, however, the consent was obtained while the defendant was still within the arena of the detention of the traffic stop.

Id. at 58.

The court's oral remarks at the suppression hearing illuminate more fully the rationale underlying the written ruling:

> And it would seem to me to be on the basis of the facts that I have heard, to draw a fine line between handing him his license and

> registration back and telling him he was just going to warn him for speeding would seem to me that it would be inappropriate for [defendant] to even think about leaving or getting out on the highway, reasonably, to me, until the Officer was safely back in his vehicle and had the lights shut off. That would be a reasonable assumption on my part.
>
> . . .
>
> I think that the finding is though, that given the context of the search, the size of the highway, the rural nature of the highway, that the fact that the officer wasn't safely back in his vehicle and the lights were still going, at least for the instantaneous time it took the officer to get back to the door and ask for the search, I think it would be unreasonable to assume [defendant] felt comfortable in leaving. I guess it goes on the facts and how I would react. That's how I feel about it.

R. 24-25, 25-26 at addendum B.

The gist of the court's ruling, then, is that the return of defendant's documents did not de-escalate the Fourth Amendment seizure to a level one voluntary encounter because defendant had "objectively reasonable cause" to believe he was still seized. The continuing seizure seems based on two facts - that the officer had not yet returned to his patrol vehicle and that he had not yet turned off his flasher lights.[1]

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[1] While the court also mentioned "the context of the search, the size of the highway, [and] the rural nature of the highway," it failed to explain how these factors impacted the conclusion that defendant was not free to leave (R. 71 at 25). In contrast, the court repeatedly mentioned that the officer had not returned to his patrol car and that his flasher lights were still on (Id.).

The trial court's analysis is flawed because it gives undue weight to these two facts while failing to consider others, as a proper analysis requires. State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994)(citations omitted).

The proper legal analysis begins with an assessment of whether one is seized for Fourth Amendment purposes. Here, defendant was plainly seized when the deputy sheriff stopped his truck for speeding. See Delaware v. Prouse, 440 U.S. 648, 663 (1979)(stopping an automobile and detaining its occupants constitutes a seizure for Fourth Amendment purposes).

Because defendant was seized, the dispositive analysis turns on how long the initial, constitutionally-protected seizure lasted.[2] Once an individual has been seized, for the seizure to end, it must be clear to the seized person, either from the words of an officer or from the clear import of the circumstances, that the person is at liberty to go about his or her business. Higgins, 884 P.2d at 1244 (citing United States v. Sandoval, 29

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[2] See State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987)(quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)(citation omitted))(articulating three categories of constitutionally permitted police-citizen encounters). The three categories of constitutionally permitted police-citizen encounters are, of course, not static. Thus, a level one consensual encounter can escalate into a level two seizure or a level three arrest, or vice versa. See United States v. Shareef, 100 F.3d 1491, 1500 (10th Cir. 1996)(explaining relationship between levels of police-citizen encounters). Only the second and third levels, however, implicate the protections of the Fourth Amendment. See, e.g., State v. Struhs, 940 P.2d 1225, 1227 (Utah App. 1997).

F.3d 537, 540-41 (10th Cir. 1994)).

In determining whether a detainee is free to go, courts look to several circumstances. The return of a detained driver's documents signals one line of demarcation. Thus, federal courts "have consistently concluded that an officer must return a driver's documentation before a detention can end." United States v. Elliott, 107 F.3d 810, 814 (10th Cir. 1997)(citing United States v. Gregory, 79 F.3d 973, 979 (10th Cir. 1996) and United States v. Werking, 915 F.2d 1404, 1404 (10th Cir. 1990)). That action, however, will not necessarily render any subsequent interchange consensual "if the driver has objectively reasonable cause to believe that he or she is not free to leave." United States v. Shareef, 100 F.3d 1491, 1501 (10th Cir. 1996)(citing United States v. Turner, 928 F.2d 956, 959 (10th Cir.), cert. denied 502 U.S. 881 (1991)); accord Elliott, 107 F.3d at 814 (and cases cited therein). In this case, where the parties agree that the officer returned defendant's documentation, the court must look to see if defendant had other objective reasonable cause to believe he was not free to leave (R. 71: 3, 8, 13).

The officer's words constitute an important part of the analysis. Certainly, telling the detainee that he is free to leave is a strong indication that a seizure is over. Nonetheless, the police need not necessarily tell a detainee explicitly that he is free to go in order for a seizure to de-

escalate into a consensual encounter. Ohio v. Robinette, 519 U.S. 33, 33-34 (1996). Here, the trial court, faced with differing testimony from the two witnesses present, refused to enter a finding about the officer's words. At the suppression hearing, after articulating oral findings and conclusions suppressing the evidence found in the truck, the trial court asked whether counsel wanted any additional findings (R. 71: 25 at addendum B). The following colloquy occurred:

> Prosecution: Yes, would you please make a finding concerning whether or not the officer indicated that [defendant] was free to go?
>
> The Court: I can't make a finding on that. The evidence was contrary. I mean, the officer said you're free to go. [Defendant] said he didn't hear him say that. The Court has an insufficient record to make a finding on that.

Id. at 25. The trial court's determination that it could not make a finding on whether the officer told defendant he was free to leave is clearly erroneous.

Officer Troy Slaw testified at both the preliminary hearing and the suppression hearing. On both occasions, he unequivocally stated that, after returning defendant's documents, he told defendant that he was free to go (R. 72: 4, 17; R. 71: 3, 10). Defendant testified at the suppression hearing, stating, "I don't recall him telling me I was free to go" (R. 71: 13). Later in

the hearing, the following interchange occurred:

> Prosecution: After he'd given you back your driver's license and your registration, he had told you that he was not going to cite you for the speeding, is that correct?
>
> Defendant: Exactly.
>
> Prosecution: And you do not recall whether or not he said you were free to go?
>
> Defendant: No.
>
> Prosecution: It's possible that he did?
>
> Defendant: Well, I didn't hear him say it.

R. 71: 16. Defendant's testimony about what the officer said regarding his freedom to leave is quoted in its entirety. At no time did defendant testify that the officer told him he could not leave. Nor did defendant testify that the officer did not tell him he was free to go. Rather, defendant's testimony consisted of two statements: first, that he could not recall whether or not the officer told him he was free to go; and second, that he did not hear the officer say that he was free to go. Id.

Defendant's lack of recall or inability to hear should not have precluded the trial court from entering a finding of fact as to whether the officer told defendant he was free to leave. At the outset, the evidence was not contrary, as the trial court averred. That is, one person can easily make a statement that

another either does not remember or does not hear.[3] Moreover, even if the evidence had been contrary, it was the trial court's role, as finder of fact, to make the necessary credibility determination to resolve the factual dispute between the witnesses. See, e.g., State v. Workman, 852 P.2d 981, 984 (Utah 1993); ProMax Dev. Corp. v. Mattson, 943 P.2d 247, 255 (Utah App. 1997). The trial court erred by abrogating this responsibility. Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983).

If this Court determines that the omission of the factual finding is dispositive to the outcome of this appeal, then this Court should remand the case for resolution of the material factual issue. If it is not, then this Court may dispose of the matter as harmless error. See Hall v. Hall, 858 P.2d 1018, 1025 (Utah App. 1993).

In addition to the return of the driver's documents and the words of the officer, courts also look to the conduct of the police towards the detainee in evaluating the objective reasonableness of the circumstances facing a detainee:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating

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[3] In fact, the only real conflict in the evidence was defendant's internal inconsistency in testifying both that he did not remember and that he did not hear (Id. at 13, 16).

> that compliance with the officer's request might be compelled.

State v. Patefield, 927 P.2d 655, 659 (Utah App. 1996)(citing United States v. Mendenhall, 446 U.S. 544, 555 (1980)(citations omitted)); accord State v. Anderson, 114 F.3d 1059, 1064 (10th Cir. 1997); Turner, 928 F.2d at 959. In this case, there is no record evidence that the lone officer drew his weapon, physically touched the defendant in any way, or used language or a tone of voice indicating that defendant might be compelled to remain. See Patefield, 927 P.2d at 659 (citations omitted). Indeed, the only evidence supporting a continued detention was defendant's testimony that the uniformed officer "stared" at him for "just a few seconds" after returning his documents (R. 71: 13-14).

The case of People v. Brownlee, 713 N.E.2d 556 (Ill. 1999) is instructive on this point. There, defendant was stopped for a traffic violation, and the officer checked and returned his documents. Id. at 559. The officer himself testified that after explaining he would not issue a citation, he then "'paused' for 'a couple [of] minutes'" while he stood at the driver's door and another officer stood at the passenger door. Id. at 565. He then asked for and obtained permission to search. The court determined that standing by the door silently for at least two minutes constituted a "show of authority" by the police and that a reasonable person would not have felt free to leave under such circumstances. Id. at 565-66. Further, in response to the

request to search, defendant asked if he had a choice in the matter, thus reinforcing the court's determination that defendant was not free to go. Id. at 566.

Contrast the facts in Brownlee with the case at bar, where defendant, not the officer, testified that the lone officer stared at him, but "for just a few seconds" (R. 71: 14). Defendant's candid admission that the officer's "stare" was fleeting supports the conclusion that, unlike Brownlee, the Fourth Amendment seizure here had ended. In addition, when asked if his truck could be searched, defendant in this case answered that it would be "fine," thus giving no indication that he felt in any way compelled (Id. at 4).

In addition, both defendant and the State agree that Officer Slaw either stepped back and moved away from the truck or turned around and took a couple of steps towards his patrol vehicle (Id. at 4, 16). Under either scenario, the officer's undisputed physical withdrawal also supports the termination of the constitutionally protected seizure. See Commonwealth v. Strickler, 757 A.2d 884, 900 (Pa. 2000)(in determining that seizure ended, court stated that although officer did not utter explicit words of release, his actions of returning documents, thanking defendant for cooperation, and turning away prior to reinitiating interaction "at least suggested" that defendant was free to go).

The trial court's analysis is flawed not only because it fails to consider these aspects of the encounter but also because it gives undue weight to two other factors - the brief time between the officer's withdrawal and his recontact with defendant, and the fact that the officer had not yet returned to his vehicle and turned off his flasher lights.

First, as to the length of the time between the officer stepping away and his recontact with defendant as an indicator of a continuing seizure, the court has distorted the proper test (R. 71: 25). Logically, the assessment of when a seizure ends must be made as of the point in time, however brief, when the facts indicate that defendant is free to go. See Mendenhall, 446 U.S. at 545-46. To apply the test in hindsight, after subsequent interactions, confuses the analysis by tacking on later events that skew the legal status of the encounter at the moment it shifts to a voluntary encounter.

Second, the court's analysis puts undue weight on the officer's return to his vehicle. The court stated that "it would be inappropriate for [defendant] to even think about leaving or getting out on the highway, reasonably, to me, until the officer was safely back in his vehicle and had the lights shut off. That would be a reasonable assumption on my part" (R. 71: 25 at addendum B). The trial court has offered no support for this new legal standard by which to assess when a Fourth Amendment seizure

has ended, and the State finds no support for such a proposition.

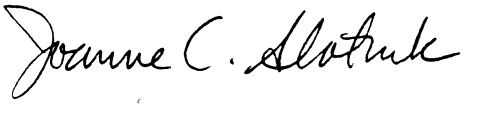
Because the facts demonstrate that the Fourth Amendment seizure de-escalated to a level one voluntary encounter when the officer returned defendant's documents, issued a verbal warning, told him he was free to go, and turned and stepped away from defendant's truck, this Court should reverse the trial court's dismissal of the case and remand for further proceedings.

CONCLUSION

For the reasons stated, this Court should reverse the district court order dismissing the charges against defendant and remand the case for trial.

RESPECTFULLY submitted this 12th day of October, 2001.

MARK L. SHURTLEFF
Attorney General



JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Wesley M. Baden, attorney for appellee, 418 East Main Street #210, Vernal, Utah 84078, this 12th day of October, 2001.

Joanne C. Slotnik

ADDENDA

Addendum A

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IN THE EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR UINTAH COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. DEAN ALLEN MOGEN, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** No. 001800211 Judge John R. Anderson

This matter came on for an Evidentiary Hearing before John R. Anderson, Eighth District Court, on November 29, 2000, on defendant's Motion to Suppress.

The State of Utah was represented by Attorney G. Mark Thomas. Defendant was present and represented by his attorney, Richard P. Mauro.

Uintah County Sheriff Deputy Troy Slaugh was called as a witness for the State and was cross examined. Dean Allen Mogen was called as a witness for the defense and was cross examined.

The Court, after hearing the evidence and arguments of counsel, does enter its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On August 22, 2000, Deputy Troy Slaugh stopped the defendant, Dean Allen Mogen, for exceeding the posted 50 mph speed limit on State Route 40 in the Jensen, Utah area.

2. The defendant was the only person in the vehicle which was a truck used in defendant's work.

3. Deputy Slaugh asked for and received defendant's driver license and possibly the vehicle registration. Deputy Slaugh then went back to his patrol car and performed a routine driver's license and warrants check.

4. Deputy Slaugh then returned to the driver side of the defendant's vehicle and returned to the defendant his license and any other paper the defendant had given him. Deputy Slaugh gave the defendant a warning for the speeding violation and then turned and took a couple steps back toward his vehicle.

5. At this time Deputy Slaugh's overhead lights were still flashing.

6. Within a few seconds Deputy Slaugh stepped back to the driver's window and asked the defendant if he had, "any guns, drugs, knives or bombs" in his vehicle. Defendant replied negatively. Deputy Slaugh then asked the defendant for permission to look.

7. The defendant agreed to allow Deputy Slaugh to look in his vehicle.

CONCLUSIONS OF LAW

1. On August 22, 2000, Deputy Troy Slaugh made a legal traffic stop on the vehicle which the defendant was the sole occupant in.

2. Based on facts of this case, the defendant did not reasonably feel comfortable in leaving, and the court finds that the natural inference is that the defendant was still being detained when the deputy asked his permission to search the defendant's vehicle.

3. The defendant voluntarily consented to a search of the vehicle he was driving, however, the consent was obtained while the defendant was still within the arena of the detention of the traffic stop.

4. Based on the case law for Utah, an officer does not have the right to ask for consent to search a vehicle during a traffic stop unless there is an independent constitutionally permitted basis for either the request or the search.

DATED this 26th day of Feb., 2001.

BY THE COURT:

John R. Anderson
District Court Judge

APPROVED AS TO FORM:

Richard Mauro
Attorney for Defendant

Addendum B

cases that have been cited by defense counsel are not cases wherein there's been a clear break and a return of the items. Most of those cases, the ones that I've been familiar with, are where the officer actually continued the detention and either did not return the driver's license or in some other way continued the existing detention.

That's not the case here. There was a clear break and what the courts have been saying in Utah are basically, there has to be some sort of continuation from the traffic stop versus the next contact which was voluntary and consensual which occurred in this case. He had returned everything, told the defendant he was free to go, stepped back and then made a new contact and sought consent.

THE COURT: Thank you, counsel.

These cases are very fact sensitive and the Court is familiar with the Utah State Case Law and some of the Court of Appeals decisions regarding these issues. Some of them are hard to distinguish but I think the distinguishing thing that we need to focus on would be given the context of the setting, and the context of the rural area, the context of many things, it would seem to me, was Mr. Mogen reasonably justified in believing that he could go ahead and leave? And it would seem to me to be on the basis of the facts that I have heard, to draw a fine line between handing him his license and registration back and telling him he was just going to warn him

for speeding, would seem to me that it would be inappropriate for Mr. Mogen to even think about leaving or getting out on the highway, reasonably, to me, until the Officer was safely back in his vehicle and had the lights shut off. That would be a reasonable assumption on my part.

I think the fact of the hesitancy, the quick return by the officer and asking for the consent search went beyond the scope of the original stop and I think in this case, that Mr. Mogen would, by the testimony that I've heard, was not justified in feeling that he was free to leave. So, I'm going to suppress the evidence. That will be the ruling. Do you want me to make any additional findings?

MR. THOMAS: Yes, would you please make a finding concerning whether or not the officer indicated that he was free to go?

THE COURT: I can't make a finding on that. The evidence was contrary. I mean, the officer said you're free to go. Mr. Mogen said he didn't hear him say that. The Court has an insufficient record to make a finding on that. I think that the finding is though, that given the context of the search, the size of the highway, the rural nature of the highway, that the fact that the officer wasn't safely back in his vehicle and the lights were still going, at least for the instantaneous time it took the officer to get back to the door and ask for the search, I think it would be unreasonable to assume Mr.

Mogen felt comfortable in leaving. I guess it goes on the facts and how I would react. That's how I feel about it.

MR. THOMAS: And are you finding this under the United States Constitution or the Utah Constitution?

THE COURT: I'm looking at the Utah Case Law and relying on Mr. Mauro's argument there. I do not know what fact distinctions there are specifically in the cases cited, Mr. Thomas but I know that in this case, it would seem to me, that Mr. Mogen would not have felt comfortable in leaving before the officer returned and asked to search the vehicle.

MR. THOMAS: So is it the Court's finding that an officer cannot seek consent unless it's reasonable that the defendant feels comfortable in leaving?

THE COURT: No. No. I think he was detained. I think the reasonable inference was that he was still being detained. I don't want to make a hard line rule on it. I'm telling you that they are fact sensitive and it is my feeling, my view of the evidence, that Mr. Mogen was still in the arena of detention when the consent was sought.

MR. THOMAS: Okay.

THE COURT: And it exceeded the scope of the original stop.

MR. THOMAS: An additional fact, is it the Court's finding that the officer did in fact step away from the window after -

THE COURT: That's what the evidence showed. He stepped away, although it may have been unsafe for him to be where he was. We don't have distance in feet. We don't have a video. He stepped away. The testimony was within a few seconds, he was there, back.

Thank you, counsel.

(Whereupon the hearing was concluded.)